

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

OPERATIVE PLASTERERS' & CEMENT MASONS'
INTERNATIONAL ASSOCIATION, LOCAL 200, AFL-CIO
AND OPERATIVE PLASTERERS' & CEMENT MASONS'
INTERNATIONAL ASSOCIATION, AFL-CIO

and

STANDARD DRYWALL, INC.

Case Nos. 21-CD-659
 21-CD-660
 21-CD-661

and

SOUTHWEST REGIONAL COUNCIL OF CARPENTERS,
UNITED BROTHERHOOD OF CARPENTERS AND
JOINERS OF AMERICA

**RESPONDENT OPERATIVE PLASTERERS' & CEMENT MASONS'
INTERNATIONAL ASSOCIATION, AFL-CIO'S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION**

On February 11, 2008, Administrative Law Judge ("ALJ") John J. McCarrick issued his decision and recommended order ("ALJD") in the above-referenced cases. In that decision, the ALJ found that Respondent Operative Plasterers' & Cement Masons International Association, AFL-CIO ("OPCMIA") and Respondent Operative Plasterers & Cement Masons International Association, Local 200, AFL-CIO ("Local 200"), collectively "Respondents," violated Sections 8(b)(4)(ii)(D) of the National Labor Relations Act ("Act"), 29 U.S.C. § 158(b)(4)(ii)(D) (2005). Respondent OPCMIA, by and through the undersigned counsel, respectfully submits its exceptions to that decision and recommended order pursuant to Section 102.46(a) of the Rules and Regulations of the National Labor Relations Board ("Board"), 29 C.F.R. § 102.46(a) (2007).

In accordance with Section 102.46(b), 29 C.F.R. § 102.46(b) (2007), the OPCMIA hereby submits the following exceptions, as well as an accompanying brief in support:

Exception No. 1: The OPCMIA excepts to the ALJ's ruling that the Respondents could not litigate the following issues in the unfair labor practice proceeding: (a) whether the Board's underlying work determinations were valid; (b) whether the matter was properly before the Board on jurisdictional issues; (c) whether the Southwest Regional Council of Carpenters ("Carpenters") colluded with the Charging Party, Standard Drywall, Inc. ("Standard Drywall"), to manufacture the basis for a proceeding pursuant to Sections 8(b)(4)(D) and 10(k); and (d) whether a voluntary method for the resolution of work disputes existed binding the parties. (ALJD at 6, lns. 19-24. *See also* ALJD at 12, lns. 47-50; ALJD at 13, lns. 1-3.) The OPCMIA designates the following portions of the record¹ to support Exception No. 1:

SDI II Tr. 152, lns. 11-25; Tr. 153, lns. 1-5; Tr. 155, lns. 19-20; Tr. 166, lns. 1-10; Tr. 169, lns. 4-9 & 12-23; Tr. 170, lns. 2-25; Tr. 171, lns. 1-5; Tr. 173, lns. 13-21; Tr. 181, lns. 6-13; Resp. Ex. 16 at 1, 10, 28, 47.

SDI III Tr. 18-26; Tr. 103, lns. 22-25; Tr. 104, lns. 1-2; ALJ Ex. 3.

Exception No. 2: The OPCMIA excepts to the ALJ's order granting Standard Drywall's petition to revoke subpoenas *duces tecum* B-504775 and B-504776 on the grounds that the subpoenas sought evidence relating to issues decided by the Board in the Section 10(k) proceeding and were not, in the ALJ's view, relevant to the issues in the Section 8(b)(4)(D) proceeding. (ALJD at 6, lns. 28-36.) The OPCMIA designates the following portions of the record to support Exception No. 2:

SDI III Tr. 26-30; ALJ Ex. 4.

¹ In light of the records from two Section 10(k) proceedings and the present Section 8(b)(4)(ii)(D) proceeding, the OPCMIA will cite to exhibits and testimony by identifying the proceeding first, followed by the particular exhibit or transcript reference. In this regard, *SDI I* is the Board's Section 10(k) proceeding in *Southwest Regional Council of Carpenters (Standard Drywall, Inc.)*, 346 NLRB 487 (2007); *SDI II* is the Board's Section 10(k) proceeding in *Southwest Regional Council of Carpenters (Standard Drywall, Inc.)*, 348 NLRB No. 87 (2007); and *SDI III* is the present Section 8(b)(4)(ii)(D) proceeding.

Exception No. 3: The OPCMIA excepts to the ALJ's conclusion that the parent union body (OPCMIA) is a proper respondent as an agent of its local union. (Local 200) (ALJ at 12 Ins. 4-11.) The OPCMIA designates the following in support of this exception GC Ex. 5-6, 10-12, and 17-18.

Exception No. 4: The OPCMIA excepts to the ALJ's conclusion that, "[t]here is no merit" the Respondents' argument that the OPCMIA's withdrawal of its request that the Plan Administrator enforce the Kelly and Greenberg awards nullifies any coercive effect of the request. (ALJD at 12, Ins. 16-17.)

Exception No. 5: The OPCMIA excepts to the ALJ's conclusion that the Respondents sought to enforce arbitration awards that are contrary to a valid "Board's section 10(k) order" when the OPCMIA sought to have the Plan Administrator enforce the Kelly and Greenberg awards on January 9, 2007. (ALJD at 12, Ins. 19-21.)

Exception No. 6: The OPCMIA excepts to the ALJ's conclusion that, "by seeking a Plan complaint awarding them the disputed plastering work, Respondents acted contrary to the Board's 10(k) decision." (ALJD at 12, Ins. 21-22.)

Exception No. 7: The OPCMIA excepts to the ALJ's conclusion that the OPCMIA's withdrawal of its request that the Plan Administrator enforce the Kelly and Greenberg awards "left the door open for a renewed threat of enforcement." (ALJD at 12, Ins. 22-25.) The OPCMIA designates the following portions of the record to support Exception No. 2:

SDI III Tr. 84, Ins. 1-12, 25; Tr. 85, Ins. 1-7 & 23-24; Tr. 111, Ins. 6-8; Tr. 120, Ins. 23-25; Tr. 121, ln. 1; OPCMIA Ex. 1; OPCMIA Ex. 2.

Exception No. 8: The OPCMIA excepts to the ALJ's conclusion that "the Plan complaint and enforcement of the Kelly and Greenberg awards continued to hang like Damocles' sword over SDI and constitute genuine threats under section 8(b)(4)(ii)(D) of the Act." (ALJD at

12, lns. 27-29.) The OPCMIA designates the following portions of the record to support Exception No. 7:

SDI III Tr. 84, lns. 1-12, 25; Tr. 85, lns. 1-7 & 23-24; Tr. 111, lns. 6-8; Tr. 120, lns. 23-25; Tr. 121, ln. 1; OPCMIA Ex. 1; OPCMIA Ex. 2.

Exception No. 9: The OPCMIA excepts to the ALJ's rejection of the Respondents' argument that neither the request for enforcement of the Kelly and Greenberg awards nor the Plan complaint can be coercive because only the Plan administrator can authorize those actions. (ALJD at 12, lns. 31-34.) The OPCMIA designates the following portions of the record to support Exception No. 8:

SDI III Tr. 84, lns. 1-12, 25; Tr. 85, lns. 1-7 & 23-24; Tr. 111, lns. 6-8; Tr. 120, lns. 23-25; Tr. 121, ln. 1; OPCMIA Ex. 1; OPCMIA Ex. 2.

Exception No. 10: The OPCMIA excepts to the ALJ's conclusion that the requests for the enforcement of the Kelly and Greenberg awards constituted a threat to Standard Drywall within the meaning of Section 8(b)(4)(ii)(D) of the Act despite the withdrawal of the requests by the OPCMIA. (ALJD at 12, lns. 36-38.)

Exception No. 11: The OPCMIA excepts to the ALJ's conclusion that the filing of a jurisdictional dispute complaint with the Plan constituted a threat to Standard Drywall within the meaning of Section 8(b)(4)(ii)(D) of the Act despite the withdrawal of the requests by the OPCMIA. (ALJD at 12, lns. 36-38.)

Exception No. 12: The OPCMIA excepts to the ALJ's finding that the OPCMIA's withdrawal of its request for a Plan complaint on January 13, 2007 "was conditional and left open the possibility that the request would be renewed if it found work was included under the Plan." (ALJD at 12, lns. 25-26.)

Exception No. 13: The OPCMIA excepts to the ALJ's conclusion that, "by pursuing the enforcement of the Kelly and Greenberg awards and the Plan Complaint after the Board issued its award" in *Standard Drywall, Inc.*, 348 NLRB No. 87 (2007), "Respondents have violated section 8(b)(4)(ii)(D) of the Act." (ALJD at 12, lns. 40-42.)

Exception No. 14: The OPCMIA excepts to the ALJ's finding, as a matter of fact, that the record establishes that "in February 2006 Local 200 Secretary-Treasurer Patrick Finley told [Standard Drywall] that it would drop the Pullen suit if Standard Drywall signed a contract covering [Standard Drywall's] California projects." (ALJD at 5, lns. 5-7. *See also* ALJD at 6, lns. 17-20.) The OPCMIA designates the following portions of the record to support Exception No. 13:

SDI II Tr. 466, lns. 14-25; Tr. 467, lns. 1-25; Tr. 468, lns. 1-8; Tr. 473, lns. 8-25;
Tr. 474, lns. 1-14; Tr. 475, lns. 6-19; Tr. 477, lns. 16-18.

Exception No. 15: The OPCMIA excepts to the ALJ's finding, as a matter of fact that "[o]n February 23, 2006, SDI informed the Carpenters that it had no choice but to assign plastering work to employees represented by Local 200, as Local 200 continued to pursue the Pullen Lawsuit." (ALJD at 5, lns. 7-9) The OPCMIA designates the following portions of the record to support Exception No. 14:

SDI II Tr. 60, lns. 14-16; Employer Ex. 11.

Exception No. 16: The OPCMIA excepts to the ALJ's finding, as a matter of law, that Labor Code Section 1777.5 of the California State Code does not compel an employer to hire from approved apprenticeship programs. (ALJD at 10, lns. 32-34.)

Exception No. 17: The OPCMIA excepts to the ALJ's finding, as a matter of law, that "there appears to be no basis in law for the Respondents' position in the Pullen lawsuit that

[Standard Drywall, Inc.] violated state labor codes when it failed to hire Local 200 apprentices.” (ALJD at 10, lns. 34-36.)

Exception No. 18: The OPCMIA excepts to the ALJ’s finding that, “even if the Pullen suit claims to enforce state labor code prevailing wage standards, the effect of Local 200’s suit is to compel [Standard Drywall] to pay damages for lost wages and benefits to employees represented by Local 200 [Standard Drywall] failed to hire contrary to the Board’s 10(k) determination.” (ALJD at 10, lns. 38-41.)

Exception No. 19: The OPCMIA excepts to the ALJ’s finding that the purpose of the Pullen lawsuit is inimical to the Board’s Section 10(k) award. (ALJD at 10, lns. 43-44 & ALJD at 11, ln. 1.)

Exception No. 20: The OPCMIA excepts to the ALJ’s finding that “[t]he continued pursuit of the Pullen litigation has an unlawful objective of compelling [Standard Drywall] to assign work to Local 200 represented employees or pay wages and benefits to Local 200 represented employees in lieu of actual work assignments” and that the pursuit of the lawsuit has an unlawful objective and constitutes coercive conduct under Section 8(b)(4)(ii)(D). (ALJD at 11, lns. 1-5.)

Exception No. 21: The OPCMIA excepts to the ALJ’s conclusion that “Local 200’s ongoing pursuit of the Pullen suit, after the Board awarded plastering work to Carpenters represented employees in [*Southwest Regional Council of Carpenters (Standard Drywall)*], 348 NLRB No. 87 (2007) is aimed at achieving the unlawful objective of coercing [Standard Drywall] into assigning plastering work to Local 200 represented employees and therefore enjoys no special protection under *Bill Johnson’s* or *BE&K* and violates Section 8(b)(4)(ii)(D) of the Act as alleged.” (ALJD at 11, lns. 7-11.)

Exception No. 22: The OPCMIA excepts to the ALJ's determination that the Tortious Interference lawsuit filed by Local 200 "is similar in nature to the in lieu damage lawsuits" in *International Longshoremen's & Warehousemen's Union, Local 32 (Weyerhaeuser Co.)*, 271 NLRB 759 (1984) and *Laborers Local 261 (W.B. Skinner, Inc.)*, 292 NLRB 1035 (1989). (ALJD at 11, Ins. 22-24.)

Exception No. 23: The OPCMIA excepts to the ALJ's determination that the effect of the Tortious Interference lawsuit is "to cause [Standard Drywall] to assign work to Local 200 represented employees or pay over \$77,000,000 in compensatory and punitive damages." (ALJD at 11, Ins. 24-26.)

Exception No. 24: The OPCMIA excepts to the ALJ's conclusion that the Tortious Interference Lawsuit constitutes "coercive conduct" that has as its objective "the return of plastering work to employees" represented by Local 200. (ALJD at 11, Ins. 26-28.)

Exception No. 25: The OPCMIA excepts to the ALJ's conclusion that the effect of the Tortious Interference lawsuit "has an unlawful object and is exempt from the *Bill Johnson's* and *BE&K* prohibitions on enjoining ongoing litigation." (ALJD at 11, Ins. 30-31.)

Exception No. 26: The OPCMIA excepts to the ALJ's conclusion that the filing and pursuit of the "Tortious Interference Lawsuit" constitutes coercive conduct in violation of Section 8(b)(4)(ii)(D). (ALJD at 11, Ins. 31-32.)

Exception No. 27: The OPCMIA excepts to the ALJ's conclusion of law that the OPCMIA and Local 200 violated Section 8(b)(4)(ii)(D) of the Act since December 13, 2006 by pursuing the Kelly and Greenberg awards and since January 9, 2007, by requesting a Plan complaint seeking plastering work at public work projects in the 12 Southern California Counties performed by SDI employees represented by the Carpenters with an object of forcing or

requiring Standard Drywall to assign the work to employees represented by Local 200 rather than employees represented by the Carpenters. (ALJD at 13, lns. 14-24.)

Exception No. 28: The OPCMIA excepts to the ALJ's conclusion of law that Local 200 has violated Section 8(b)(4)(ii)(D) of the Act since December 13, 2006 by pursuing the Pullen and "Tortious Interference" lawsuits with an object of forcing or requiring Standard Drywall to assign the plastering work to employees represented by Local 200 rather than to employees represented by the Carpenters. (ALJD at 13, lns. 26-33.)

Exception No. 29: The OPCMIA excepts to the ALJ's recommended remedy of an award of reasonable legal fees and costs incurred after December 13, 2006 against Local 200 in conjunction with defending the Pullen and "Tortious Interference" lawsuits, defending the enforcement of the Kelly and Greenberg awards and defending the request for a Plan complaint. (ALJD at 14, lns. 18-27; ALJD at 16, lns. 13-15.)

Exception No. 30: The OPCMIA excepts to the ALJ's recommended remedy of an award of reasonable legal fees and costs incurred after December 13, 2006 against the OPCMIA in conjunction with defending the enforcement of the Kelly and Greenberg awards and defending the request for a Plan complaint. (ALJD at 14, lns. 18-27; ALJD at 15, lns. 11-12.)

Exception No. 31: The OPCMIA excepts to the ALJ's recommended order that requires the Respondents to cease and desist from seeking to enforce the Kelly and Greenberg awards against Standard Drywall and actually seeking a Plan complaint seeking plastering work performed by Standard Drywall's employees in the 12 Southern California Counties on public works projects with the intent of requiring Standard Drywall to assign the disputed work to employees represented by Local 200 rather than employees represented by the Carpenters. (ALJD at 14, lns. 41-44 & ALJD at 15, lns. 1-3, 36-40.)

Exception No. 32: The OPCMIA excepts to the ALJ's recommended order that requires Local 200 to cease and desist from maintaining the Pullen and "Tortious Interference" lawsuits with an object of requiring Standard Drywall to assign work to employees represented by Local 200 rather than to employees represented by the Carpenters. (ALJD at 15, lns. 42-45.)

Exception No. 33: The OPCMIA excepts to the ALJ's recommended order that requires the Respondents to unconditionally withdraw and cease attempting to enforce the Kelly and Greenberg awards, as well as unconditionally withdraw the request for a Plan complaint seeking plastering work at public works projects in the 12 Southern California Counties performed by Standard Drywall's employees represented by the Carpenters. (ALJD at 15, lns. 6-9 & ALJD at 16, lns. 6-9.)

Exception No. 34: The OPCMIA excepts to the ALJ's recommended order that requires Local 200 to withdraw the Pullen and Tortious Interference lawsuits. (ALJD at 16, ln. 11.)

Exception No. 35: The OPCMIA excepts to the ALJ's recommended order that requires the Respondents to post their offices and meeting halls copies of the Notice marked as Appendix A to the decision and recommended order for 60 consecutive days in conspicuous places. (ALJD at 15, lns. 14-21; ALJD at 16, lns. 17-24.)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 24th day of March, 2008, a true and correct copy of the foregoing "Respondent Operative Plasterers' & Cement Masons' International Association, AFL-CIO's Exceptions to the Administrative Law Judge's Decision" and Respondent Operative Plasterers' & Cement Masons' International Association's Brief in Support of its Exceptions to the Administrative Law Judge's Decision" were served by overnight mail on the following:

For the General Counsel:

Ami Silverman, Esq.
National Labor Relations Board, Region 21
888 South Figueroa Street, 9th Floor
Los Angeles, CA 90017

For OPCMIA, Local 200:

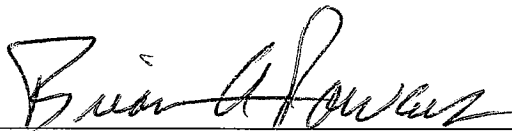
John J. Davis, Esq.
Paul More, Esq.
Davis, Cowell & Bowe LLP
595 Market Street, Suite 1400
San Francisco, CA 94105

For Southwest Regional Council of Carpenters:

Daniel M. Shanley, Esq.
DeCarlo Connor Shanley
533 South Fremont Avenue, 9th Floor
Los Angeles, CA 90071

For Standard Drywall, Inc.:

Mark T. Bennett, Esq.
Marks, Golia & Finch LLP
3900 Harney Street, 1st Floor
San Diego, CA 92110



Brian A. Powers

Exception No. 36: The OPCMIA excepts to the ALJ's recommended order that requires the Respondents to sign and mail copies of the Notice marked as Appendix A to the Regional Director for posting by Standard Drywall on the jobsite. (ALJD at 15, Ins. 23-25; ALJD at 16, Ins. 26-28.)

Respectfully submitted,

DATED: March 24, 2008

By:

A handwritten signature in black ink, appearing to read "Brian A. Powers", is written over a horizontal line.

Brian A. Powers

Keith R. Bolek

O'DONOGHUE & O'DONOGHUE LLP

4748 Wisconsin Avenue, NW

Washington, D.C. 20016

(202) 362-0041

Counsel for Respondent OPCMIA

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